MOHAMAD RAMBLI KAWI & ANOR A

v.

KHIDMAT MANTAP SDN BHD & ORS

HIGH COURT SABAH & SARAWAK, KUCHING B
RHODZARIAH BUJANG JC
[SUIT NO: 22-55-2008-I]
27 JULY 2011

NATIVE LAW AND CUSTOM: *Land dispute - Native customary rights - Plaintiffs claimed to have bought native customary rights land - Plaintiffs compensated by Government of Sarawak when parts of land acquired for public purpose and affected by road alignment - 1st defendant granted lease for disputed land - Whether transfer of native customary rights from Ibans to Malays is permissible by law and/or customs - Whether damages to be awarded if there was a valid transfer* C D

The plaintiffs in this case, who were Malays by race, claimed to have bought fifteen pieces of Temuda land (land held under native customary rights for Ibans in Sarawak) ('the fifteen pieces of land') from their original owners *vide* "Surat Perjanjian Menyerah Tanah Temuda" or Agreements To Surrender Temuda Land ('the agreements'). In 1998, the plaintiffs were compensated by the Government of Sarawak ('3rd defendant'), through its agent, the Superintendent of Lands & Surveys Samarahan Division ('2nd defendant') when seven pieces of the land were acquired for public purposes and after a survey of the land was initiated. The plaintiffs were also compensated when some part of the lands were affected by a road alignment. However, on 4 June 2004, the 2nd defendant granted a provisional sixty-year lease to Khidmat Mantap Sdn Bhd ('1st defendant') which covered all the fifteen pieces of land owned by the plaintiffs. The plaintiffs filed this action for, *inter alia*, (i) a declaration that they have acquired native customary rights over the said land and (ii) for damages arising from the alienation to the 1st defendant of the said land. On the other hand, *vide* an application under O. 14A Rules of the High Court 1980 by the 2nd and 3rd defendants, the question of law that arose for determination was whether, having regard to the statement of claim filed by the plaintiffs herein, the purported sale or transfer of native customary rights land from Ibans to Malays is permissible by law and/or customs applicable thereto. E F G H I

Held (dismissing plaintiffs' action with no order as to costs):

(1) Native customary rights cannot be transferred by ordinary sale and purchase agreements and native customary rights by its nature is not a right *in rem* and that the transfer of such rights must take place according to strict compliance of customary formality. Native customary rights owners do not actually 'own' the land. They merely look after it for the next generation. (*Bisi Jinggot v. Superintendent Of Lands and Survey Kuching Division & Ors,* foll; *Sumbang Anak Sekam v. Engkarong Anak Ajah,* foll; *Sat Anak Akum & Anor v. Randong Anak Charereng*, foll). (paras 5 & 15)

(2) These rights are indigenous to the place and the people and it is this very specific characteristic that moves to steadfastly hold the view that the transfer of native customary rights for valuable consideration is not permissible and if at all it is to be allowed, it must be from those in the same community as the original owner. If native customary rights land can be sold and bought (or dealt with) like any other alienated land, it will lose its significance and belittle the legal recognition implicit in the 'ownership' of the said land. (*Mohamad Rambli Kawi v. Superintendent of Lands & Surveys Kuching & Anor,* refd). (paras 7 & 14)

Case(s) referred to:

Bisi Jinggot v. Superintendent of Lands and Survey Kuching Division & Ors [2008] 5 CLJ 606 HC ***(foll)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 FC ***(refd)***

Commissioner for Religious Affairs; Trengganu & Ors v. Tengku Mariam Tengku Sri Wa Raja & Anor [1970] 3 LNS 1 FC ***(refd)***

Hamit Matusin & Ors v. Superintendent of Lands & Surveys & Anor [1991] 2 CLJ 677; [1991] 2 CLJ (Rep) 1524 HC ***(refd)***

Laga v. Uging & Anor [1965] 1 LNS 77 HC ***(refd)***

Mohamad Rambli Kawi v. Superintendent of Lands Kuching & Anor [2010] 1 LNS 115 HC ***(refd)***

Sapiah Mahmud v. Superintendent of Lands And Surveys Samarahan Division & Ors [2009] 9 CLJ 567 HC ***(refd)***

Sat Anak Akum & Anor v. Randong Anak Charereng [1958] SCR 104 ***(foll)***

Sumbang Anak Sekam v. Engkarong Anak Ajah [1958] SCR 95 ***(foll)***

Taylor Fashions Ltd v. Liverpool Victoria Friendly Society [1981] 1 All ER 897 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14A

For the plaintiffs - See Chee How; M/s Baru Bian Advocates
For the 2nd & 3rd defendants - Saferi Ali, State Legal Officer, AG's Chambers

Reported by Baizura Abdul Razak

JUDGMENT

Rhodzariah Bujang JC:

[1] The two plaintiffs in this case are Malay by race. They claimed to have bought fifteen pieces of land (known by their respective Field lot numbers) from their original owners by way of *"Surat Perjanjian Menyerah Tanah Termuda"*, loosely translated to mean "agreements to surrender temuda land". 'Temuda' land means, for the Ibans in Sarawak, land held under native customary rights and it is established when virgin jungles are cleared for cultivation. It is not disputed that the 'vendors' for these 15 pieces of land are Iban by race and that the plaintiffs had for valuable consideration acquired the said land from them. In fact in 1998 (*vide* payment voucher dated 10 November 1998) the plaintiffs were compensated by the Government of Sarawak, through its agent, the Superintendent of Lands & Surveys Samarahan Division when part of seven pieces of the land were acquired for public purpose and after a survey of the land was initiated under Job No. 112/96. They were also compensated when part of some of the lands were affected by a road alignment. All was well until 4 June 2004, when the Superintendent of Lands & Surveys granted a provisional sixty years lease to a company, Khidmat Mantap Sdn Bhd which covered all that the plaintiffs owned of the fifteen pieces of land.

[2] Thus the plaintiffs filed this action for, *inter alia*, a declaration that they have acquired native customary rights over the said land and for the company (sued as the 1st defendant), the Superintendent of Lands & Surveys and the State Government of Sarawak (sued as the 2nd and 3rd defendants respectively) to pay them damages arising from the alienation to the company of the said land.

[3] On 23 February 2009, I allowed the company's application to strike out the claim against them. In my written decision I gave two reasons why that order was made. First, it was because the plaintiffs failed to exhibit the very documents upon which their claim to the land are based ie, the *"Surat Perjanjian Menyerah Tanah Temuda"* and secondly, their failure to depose to the exact circumstances in which they acquired the said lands in order that the *ratio* in *Hamit Matusin & Ors v. Superintendent of Lands & Surveys & Anor* [1991] 2 CLJ 677; [1991] 2 CLJ (Rep) 1524 would apply ie, the transfer involved persons from within the same community of that particular area and which is allowed by the customary law of that community. At a hearing on 24 May 2011, I was informed by the plaintiffs' counsel that the plaintiffs have withdrawn their appeal in the Court of Appeal against the said decision.

[4] Now, by a summons in chambers dated 6 May 2011 the Superintendent of Lands & Surveys and the State Government of Sarawak have filed an application under O. 14A of the Rules of the High Court 1980 to determine this question of law, *viz*,

> Whether, having regard to the statement of claim filed by the plaintiffs herein, the purported sale or transfer of native customary rights (ncr) land from Ibans to Malays is permissible by law and/or customs applicable thereto.

[5] From the time I delivered my decision on the striking out application to the filing of this O. 14A application, the Court of Appeal has, in that intervening period, affirmed a decision of Hamid Sultan Abu Backer, JC (as His Lordship then was) in *Bisi Jinggot v. Superintendent of Lands and Survey Kuching Division & Ors* [2008] 5 CLJ 606, in which His Lordship held that native customary rights cannot be transferred by ordinary sale and purchase agreements and native customary rights by its nature is not a right *in rem* and that the transfer of such rights must take place according to strict compliance of customary formality.

[6] The decision of His Lordship in fact was in accord with decisions made way back in 1958, by the Native Court of Appeal of Sarawak in *Sumbang Anak Sekam v. Engkarong Anak Ajah* [1958] SCR 95 and by the same Court of Appeal in *Sat Anak Akum & Anor v. Randong Anak Charereng* [1958] SCR 104. Both were decisions of Lascelles J. In recent times, Albert Linton J (as His Lordship then was) has also decided along the same line in *Sapiah*

Mahmud v. Superintendent of Lands And Surveys Samarahan Division & Ors [2009] 9 CLJ 567. The plaintiff in that case is none other the 2nd plaintiff in this case. Similarly, she claimed to have bought the parcels of land from the native customary rights owners and the said lands are similarly situated in the same area of Samarahan division of Sarawak, ie, Merdang Limau as the parcels of land in this case before me.

[7] In response to the submission of Mr. Saferi bin Ali for the 2nd and 3rd defendants, the plaintiffs' counsel Mr. See Chee How has cited to me the decision of David Wong Dak Wah J in *Mohamad Rambli Kawi v. Superintendent of Lands Kuching & Anor* [2010] 1 LNS 115 in support of his contention that customary rights land can be transferred for valuable consideration by its owner as long as the same is permitted by the custom of the natives themselves. I must, however, quickly add here that the transfers in the said case involves those from the same race ie, Malays, just like the relevant parties in *Hamit Matusin*'s case *(supra)*. With regards to the decisions of the Lascelles J in the two 1958 cases, Mr. See Chee How referred to the decision of Lee Hun Hoe J (as His Lordship then was) in *Laga v. Uging & Anor* [1965] 1 LNS 77 in which His Lordship quoted extensively from the decision of Lascelles J in *Sat*'s case *(supra)*. He highlighted the fact that what Lascelles J said about the prohibition of sale of native customary rights land by the Ibans only referred to those Ibans from the 3rd, 4th and 5th Divisions in Sarawak because that prohibition is codified in the 'Tusun Tunggu' and has application to the Ibans in those Divisions only.

[8] In my view, Mr. See Chee How has overlooked the importance of the judgment of Lascelles J in *Sumbang*'s case *(supra)* which actually involved the Ibans in the 2nd Division and the consideration by His Lordship of the Tusun Tunggu on disposition by an Iban of his property (titled and untitled) by will and where at p. 107 thereof, he concluded as follows:

> I am completely satisfied that a Dayak can make a valid written will. Indeed I consider that such is infinitely preferable to the making of oral declaration before witnesses. *The point however which causes me considerable difficulty and which is clearly of very great importance, not only to Dayaks of the Second Division but also to all other Dayaks,* is whether or not such a will can dispose of property otherwise than in accordance with Dayak *adat*. (emphasis added).

[9] Thus what His Lordship said, subsequently about 'Temuda rights' (at p. 109 of the report) to wit, that it is a form of customary tenure where the holders are mere licencees of the Crown and that it cannot be transferred for value is a general observation not just reserved for the Ibans of the three Divisions mentioned earlier. I happened to share the same view expressed by His Lordship above and that of Linton Albert J and Hamid Sultan JC in the cited cases mentioned earlier but consistent with my earlier ruling in this case, I also reiterate that it is not a blanket prohibition that native customary rights land cannot be transferred for valuable consideration like any alienated land. It would depend very much on the customs, I must stressed, of the owners of the native customary rights and the transfer is confined within their community as was the case in *Hamit Matusin*'s case *(supra)*.

[10] Nonetheless, I am constrained to take the view that the qualification mentioned above does not apply in this case for two reasons.

[11] Firstly, the plaintiffs did not, in opposing this application, present any affidavit evidence from a credible source to say that the original native customary rights owners of the fifteen pieces of land are allowed, under Iban custom to transfer the said land for value to someone of a different race and outside their community. I fully appreciate Mr. See Chee How's argument that this is a summary application and the plaintiffs therefore should be given the chance to fully ventilate their claim at the trial by the calling of witnesses including an expert witness on the custom of the sellers. Nevertheless, even at this summary stage, there must be some evidence that I could consider, of some weight of course, to persuade me that the plaintiffs' purchase of the said lands are allowed by custom especially since they are of a different race and community than the sellers. In other words, I could not act on a supposition that such evidence would be available at the full trial of this action.

[12] What of the fact, one may ask, that the plaintiffs were compensated by the 2nd and 3rd defendants when part of some of the fifteen pieces of land were acquired by the government for public purpose and for road alignment? My answer to that is the plea of estoppels (which by the way was not specifically pleaded by the plaintiffs in their statement of claim but which for the sake

of argument I am prepared to consider based on their pleaded facts of having received the compensation from the State Government) cannot apply in this case because the decision of the Court of Appeal affirming *Bisi*'s case *(supra)* was made after the compensation were paid. Thus, at the time when they were paid, there were only conflicting High Courts' decisions on whether native customary rights land can be sold but which the Court of Appeal in *Bisi*'s case *(supra)* has put to rest. Therefore, eventhough the equitable doctrine of estoppel can operate to deny a litigant from denying the validity of an otherwise invalid trust like in *Commissioner for Religious Affairs; Trengganu & Ors v. Tengku Mariam Tengku Sri Wa Raja & Anor* [1970] 3 LNS 1 or the validity of an option in a lease declared by statute to be invalid for want of registration as in *Taylor Fashions Ltd v. Liverpool Victoria Friendly Society* [1981] 1 All ER 897 (both cases quoted with approval by the Federal Court in *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283) the same does not apply in this case. This is because the 2nd and 3rd defendants cannot be said to have condoned or accepted the illegality of the transactions that the plaintiffs had with the original native customary rights owners when the certainty of the true position of these transactions were only confirmed by a subsequent decision of the Court of Appeal in affirming *Bisi*'s case *(supra)*. For this reason, the pleaded facts pertaining to compensations paid to the plaintiff does not override the first consideration I made above, nor the second one I am about to make below.

[13] Most importantly, I subscribe fully to the view that native customary rights is meant to be enjoyed and is privileged to the original holders of these rights, their heirs and descendants only. However, to paraphrase what Lascelles J said in *Sumbang*'s case *(supra)*, if the original holder leaves the district (without any heirs and descendants) the land should revert to the longhouse for use of the community and at the discretion of the *Tuai Rumah*, the land can be allocated to anyone from the same longhouse in need of it. Lascelles J proceeded thereafter to detail the other scenarios should the owner returns to the district or leaves it without any heirs, but which considerations are irrelevant to the issue in this judgment. Although I have the backings of the earlier cited decisions, including that of the Court of Appeal in affirming Hamid Sultan Abu Backer JC's decision in *Bisi*'s case *(supra)*, I am

compelled out of respect and deference to David Wong Dak Wah J's decision in *Mohamad Rambli*'s case *(supra)* to explain my stand on this issue further.

[14] In my view, the whole concept of native customary rights is founded upon the owner's right to live not just on the land but to live off it as well because the owners of native customary rights derive both sustenance and livelihood from the land and it is not confined to an individual demarcated piece of land but encompasses rights over surrounding lands, forests and rivers. Native customary rights is therefore either individual and/or communal. When it is communal, there are no demarcations, for the individual, of the physical boundary of that right – the land, the forest and the rivers are to be shared by the very community they sustained. Whether individual or communal, these rights are indigenous to the place and the people and it is this very specific characteristic that moves me to steadfastly hold the view that the transfer of native customary rights for valuable consideration is not permissible and if at all it is to be allowed, it must be from those in the same community as the original owner. If native customary right land can be sold and bought (or dealt with) like any other alienated land, it will lose its significance and belittle the legal recognition implicit in the 'ownership' of the said land (communal or otherwise) that the native customary rights owner is bestowed with the right to live on and off the land. I hope to be forgiven for ending this judgment by paraphrasing a tagline used to advertise a famous watch, but quote it I must for the aptness of it – native customary rights owners do not actually 'own' the land. They merely look after it for the next generation.

[15] The upshot of what is said above is the question posed in the application is answered in the negative and a *fortiori*, the plaintiffs' action is dismissed but with no order as to cost because the 2nd and 3rd defendants should have filed this application or a striking out application timeously and not dragged their feet over it for so long.